84-331

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AUG 29 1984
ALEXANDER L. STEVAS,
CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

October Term 1983

DOROTHY ENRIGHT, et al.,

Petitioners,

v.

BOARD OF SCHOOL DIRECTORS OF
THE CITY OF MILWAUKEE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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August 29, 1984

61 pp

QUESTION PRESENTED FOR REVIEW

Whether the availability of a state "wrongful death" remedy provides due process adequate to satisfy the Fourteenth Amendment, when petitioners' substantive rights to life and/or liberty have been deprived by respondents' reckless conduct or negligent acts.

LIST OF PARTIES

Dorothy Enright, as Special Administrator of the Estate of Heath Enright; Heath Enright, Renee Enright, Joseph Enright, and Joseph Enright, Jr.,

Petitioners,

v.

Board of School Directors of the City of Milwaukee, Diane Clark, Wausau Insurance Companies; Peggy Kenner, President; Dr. Lee F. McMurrin, Superintendent; and John J. Peterburs, Secretary-Business Manager,

Respondents.

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OPINIONS BELOW

The Opinion of the Circuit Court of Milwaukee County is unreported, and is contained in the Appendix at App. 1.

The Opinion of the Wisconsin Court of Appeals is reported at 114 Wis.2d 124, 338 N.W.2d 114, and is contained in the Appendix at App. 7.

The Opinion of the Wisconsin Supreme Court is reported at _____ Wis.2d ____, 346 N.W.2d 771, and is contained in the Appendix at App. 20.

JURISDICTION

The Decision of the Supreme Court of the State of Wisconsin was filed on April 24, 1984. Petitioners' motion for rehearing was denied in an Order dated June 5, 1984. Jurisdiction for review by Writ of Certiorari in this Court is granted by 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

U. S. CONSTITUTION, AMENDMENT XIV:

> SECTION 1. . . . nor shall any state deprive any person of life, liberty or property . . . without due process of law. . . .

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law . . .

STATEMENT OF THE CASE

I. FACTS

This case concerns the death of a 7-year old boy. Virginia Burgardt lived across the street from the Hampton Elementary School in the City of Milwaukee. On September 14, 1979, at approximately 10:00 a.m., she observed a white male in his early twenties, later identified as Thomas White,

standing near the playground at the Hampton Elementary School, acting in a strange and suspicious manner as he watched children who were playing during recess. White watched the children at recess and repeatedly looked around, apparently to determine if anyone was watching him.

At approximately 11:00 a.m. on the same date, Cynthia Winquist was at the Hampton Elementary School "tot-lot" with her 2-year old son. She observed the adult male watching the other children who were at recess on the playground at the time. Cynthia Winquist became suspicious of the man and later told the police that at the time the man was observing the children on the playground, he appeared to be "snickering" to himself. Cynthia Winquist observed an electrical cord hanging out of the adult white male's trouser pocket. Upon seeing this, she grabbed her child and left the tot-lot.

Virginia Burgardt observed the episode between Cynthia Winquist, her child, and the unidentified adult white male. She became concerned and telephoned the principal's office at the Hampton Elementary School. The telephone was answered by the secretary on duty, Diane Clark. Virginia Burgardt advised the secretary of the man outside the school, near the playground, acting in a suspicious and unusual manner, and asked that the school notify the police. Diane Clark told Virginia Burgardt that she would inform the principal, Mr. Dakich.

Another neighbor, Kathlyn Voegtline, also observed the unidentified adult male leaning on the playground fence, gazing into the playground area at a time when there were no children on the playground. This was approximately 11:30 a.m. Both Mrs. Burgardt and Mrs. Voegtline commented to one another about the man's presence after Mrs. Burgardt had telephoned the principal's office.

Diane Clark, the school secretary, acknowledged receiving the telephone call from Mrs. Burgardt. She later told her supervisor that she had taken the message but "set it aside" and it "completely slipped her mind." Just after lunch, Diane Clark learned that a student had been killed or injured near the school. Upon receiving this information, she tied the earlier phone call from the neighbor to the death or injury. It was at this time that she brought the phone call to the principal's attention.

On September 14, 1979, Heath Enright was a second grader at the Hampton Elementary School. He was attending school pursuant to Wis. Stats., §118.15, a Wisconsin statute that requires all individuals, ages 7 through 16 years, to attend school. Therefore, a special relationship was established between Heath Enright and the State because of the State's exercise of its police powers compelling education

for Heath Enright and others of his age group.

Heath Enright left the school at 12:00 p.m. that day to go home for lunch. At approximately 1:00 p.m., Robert Miller and his wife were driving approximately one block from the Hampton Elementary School. They observed a young child lying on the grass between the sidewalk and the curb. Mr. Miller went to assist and found the lifeless body of Heath Enright. Robert Miller confronted an adult white male standing nearby in connection with the discovery of Heath Enright's body. The adult white male, later identified as Thomas White, admitted to the Millers that he had strangled Heath Enright with a piece of wire and that he had taken the wire back to his home and returned to the scene. After the police arrived, White took police officers to the basement of his house and identified a black electrical wire on the floor as the one used to

strangle Heath Enright.

At the time of Heath Enright's death, Captain Robert Proulx was the captain of the Fourth District of the Milwaukee Police Department, the district in which the Hampton Elementary School is located. Captain Proulx would have testified at trial that complaints regarding strangers on or near the school grounds in his district are always received with high priority. Captain Proulx would have further testified that had the Fourth District received the complaint regarding this suspicious person on or near the Hampton Elementary School grounds, officers would have responded and questioned the person in order to determine whether he had any legitimate business at or near the school. The officers normally would have checked out the school throughout the day in order to determine whether the suspicious person had returned to the area surrounding the school. Further, he would have testi-

fied that the responding officers would have had the option to arrest White for the violation of the City of Milwaukee loitering ordinance which specifically prohibits loitering near or on school grounds. Additionally, Captain Proulx would have testified that had circumstances warranted it, the investigating officers would have been authorized to take White into custody for psychiatric evaluation.

Heath Enright was survived by his twin sister, Renee Enright, his brother, Joseph Enright, Jr., and his parents, Joseph Enright and Dorothy Enright. An action was commenced on behalf of the Estate and the surviving family. Count I of the Complaint alleges a wrongful death action under State law, Wis. Stats., §895.04. Count II alleges a civil rights violation, brought under 42 U.S.C. §1983, wherein Renee Enright, Joseph Enright, Jr., and Heath's parents allege that they were de-

prived of the love and companionship of their brother and child due to the unjustified and arbitrary conduct of a government agent, Diane Clark, all in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The trial court, on motion of the respondents, dismissed both Counts of the Complaint. The Court of Appeals reinstated Count I of the petitioners' cause of action (which limits Heath's parents to a maximum recovery of $25,000.00), but affirmed the trial court's dismissal of the §1983 action. The Wisconsin Supreme Court affirmed the ruling of the Court of Appeals, basing its decision on the United States Supreme Court decision in Parratt v. Taylor, 451 U.S. 527 (1981), and interpreting that decision to apply to cases involving substantive due process, and mandating a holding that the Wisconsin Wrongful Death Act provides adequate post-deprivation relief to satisfy the Due Process Clause of the Fourteenth

Amendment to the United States Constitution.

II. RAISING THE FEDERAL QUESTION

As stated above, Count II of petitioners' Complaint is brought under 42 U.S.C. §1983, and the Fourteenth Amendment to the United States Constitution. This Count was dismissed by the trial court, and this decision has been affirmed by both the Wisconsin Court of Appeals and the Wisconsin Supreme Court. The petitioners claim that respondents' reckless disregard of petitioners' rights, and/or negligence, is a violation of the Fourteenth Amendment to the United States Constitution, actionable through 42 U.S.C. §1983, was raised at the outset of this action and consistently maintained throughout the proceedings.

REASONS FOR GRANTING THE WRIT

I. THE WISCONSIN SUPREME COURT HAS TAKEN A POSITION INCONSISTENT WITH THAT OF DECISIONS OF THE UNITED STATES SUPREME COURT.

The Supreme Court of the State of Wisconsin concluded that because Wisconsin has a tort remedy (Wisconsin's Wrongful Death Act), there is no constitutional violation because the state action satisfies the requirements of due process. In rejecting the petitioners' claim, the Supreme Court of Wisconsin relied upon Parratt v. Taylor, 451 U.S. 527 (1981). However, the Wisconsin Court's reading of Parratt is completely at odds with cases which have followed Parratt.

Parratt v. Taylor, supra, involved a 42 U.S.C. §1983 claim where a state inmate alleged that certain prison officials had negligently caused him to lose hobby materials valued at $23.00 when normal prison procedures concerning the handling of such material were not followed. The Court held in Parratt that because the inmate had a remedy under Nebraska state law to obtain the return of his property or

money damages, there was not a constitutional deprivation in terms of procedural due process since the property could be replaced by using the state remedy. The Supreme Court of the State of Wisconsin expanded Parratt to hold that whenever there is any state law remedy designed to redress the particular deprivation, including life and liberty, no constitutional violation can occur. This interpretation is inconsistent with Parratt and later cases decided by the United States Supreme Court.

The Supreme Court of the State of Wisconsin relied solely upon Parratt and their decision and failed to consider Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), which explored the implications of Parratt and rejected the expansive reading of it made by the Wisconsin court.

The Court in Parratt held that the availability of a state remedy which provided a post-deprivation hearing under some circumstances, could provide procedural due

process:

> "[We] recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful pre-deprivation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the State's claim at some time after the initial taking, satisfy the requirements of procedural due process." (Emphasis supplied). Parratt, supra, at 539, 101 S. Ct. at 1914.

Thus, even the majority opinion was careful to note that its holding was limited to procedural aspects of due process.

Justices Brennan, Stevens, and Chief Justice Burger joined Justice Rehnquist in the majority opinion, without reservation. Justice Blackmun joined with Justice White in a concurrence which emphasized the inherent, limited holding of Parratt in several respects:

> "While I join the Court's opinion in this case, I write separately to emphasize my understanding of its narrow reach. This suit concerns the deprivation only of property and

> was brought only against supervisory personnel, . . . I do not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty. [Citation omitted]. I also do not understand the Court to intimate that the sole content of the Due Process Clause is procedural regularity. I continue to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process. [Citations omitted]." Parratt, supra, at 455, 101 S. Ct. at 1917.

The Wisconsin court, while noting Justice Blackmun's concurrence, did not find his distinction persuasive:

> "The Court in Parratt did not distinguish between substantive due process and procedural due process injuries." (Appendix at App. 31).

The Wisconsin court never acknowledged the clear language of both the majority and the Blackmun concurrence, which stressed that Parratt applied only to denial of procedural due process and did not reach denials of substantive due process.

Even if Parratt, read alone, could be given the expansive reading the Wisconsin Supreme Court gives it, a subsequent case by the United States Supreme Court shows the true implication of Parratt. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), explained the limited reach of Parratt.

Logan had charged his employer with unlawful discrimination under Illinois state law. Logan's claim was filed before the Illinois Fair Employment Practices Commission. The Commission failed to convene a fact-finding conference within 120 days as required by state law. The Illinois Supreme Court held that this had deprived the Commission of jurisdiction and ordered the case dismissed.

The United States Supreme Court reversed, holding that Logan's cause of action against his employer was a substantive "property interest" within the meaning of the Due Process Clause that had been

denied, and that the deprivation was unconstitutional whether or not it was malicious or merely negligent. The appellee in Logan had urged that Parratt was controlling in that Logan had a potential claim against the Commission under the Illinois Court of Claims Act. Logan, supra, at 435, 102 S. Ct. at 1157. The Court, however, held:

> "Seeking redress through a tort suit is apt to be a lengthy and speculative process, which, in a situation such as this one, will never make the complainant entirely whole: The Illinois Court of Claims Act does not provide for reinstatement . . . and even a successful suit will not vindicate Logan's right to be free from discriminatory treatment." Logan, supra, at 437-38, 102 S. Ct. at 1158.

Logan makes it clear that Parratt does not apply to circumstances where a substantive right, as opposed to a procedural right, was claimed:

> "The evil condemned in Logan lay not in the Illinois failure to provide Logan with notice

> and hearing before ordering his claim dismissed; he did receive notice and hearing in the form of an appeal to the Illinois Supreme Court. Rather, the evil lay in the fact that the reason given for terminating the claim was impermissible, given the unjustifiable risk of error that the Illinois rule created." Begg v. Moffitt, 555 F. Supp. 1344 (N.D. Ill. 1983).

In other words, Illinois could not create a cause of action (a property interest) and then arbitrarily take it away even if Illinois was willing to allow judicial review (i.e., procedural due process) of that governmental action.

In summary, the original limitations which Justice Blackmun suggested in Parratt have clearly become the established law in Logan. Since the petitioners in this case have alleged a deprivation of their substantive rights to life and liberty, the Wisconsin Supreme Court decision dismissing the action is clearly at odds with the decision of the United States Supreme Court in Parratt and Logan.

Finally, the decision by the Wisconsin Supreme Court comes into direct conflict with Monroe v. Pape, 365 U.S. 167 (1961), which stands for the basic tenet of 42 U.S.C. §1983, that a person who has been deprived of constitutional rights may seek federal relief even if a remedy could also be obtained under state law. This decision, recently affirmed in Patsy v. Board of Regents, _____ U.S. _____, 102 S. Ct. 2557, 73 L. Ed.2d 172 (1982), has never been overruled by the United States Supreme Court, but the view of Parratt taken by the Wisconsin Supreme Court in this case does just that, by holding that the availability of a state tort remedy satisfies substantive due process, thus precluding recovery for the constitutional violation.

II. THE WISCONSIN SUPREME COURT HAS TAKEN A POSITION INCONSISTENT WITH THAT OF THE DECISIONS OF THE SEVENTH CIRCUIT COURT OF APPEALS.

In Wolf-Lillie v. Sonquist, 699

F.2d 864 (7th Cir. 1983), the Seventh Circuit Court of Appeals clearly demonstrates that it has adopted the reasoning of Justice Blackmun in his concurrence in Parratt v. Taylor, supra:

> "Application of Parratt to substantive violations of Constitution . . . is an entirely different matter. A finding that governmental action violated an independent substantive right secured by the Constitution is substantially different from a ruling that such action deprived a citizen of his right to procedural due process. [Citations omitted]." Wolf-Lillie, supra, at p. 871.

After citing a portion of Justice Blackmun's opinion in Parratt, the Seventh Circuit Court of Appeals went on to state that:

> "Parratt is thus not applicable to instances where the substantive guarantees of the Constitution are alleged to be violated, as opposed to alleged violations of procedural due process." Wolf-Lillie, supra, at p. 872.

See also, Evans v. City of Chicago, 689 F.2d 1286 (7th Cir. 1982); Vail v. Bd. of Educ. of Paris Union Sch. Dist. No. 95,

706 F.2d 1435 (7th Cir. 1983); Madyun v. Thompson, 657 F.2d 868 (7th Cir. 1981).

The Wisconsin Supreme Court's explicit rejection of the Blackmun rationale in Parratt is clearly at odds with the Seventh Circuit Court of Appeals' decision in Wolf-Lillie which wholeheartedly accepts that same rationale. Therefore, an individual with a §1983 claim of a similar factual nature to the instant action could expect two different decisions in Wisconsin, depending on whether the action was brought in state or federal court.

III. THE DECISION OF THE WISCONSIN SUPREME COURT BELOW RAISES SIGNIFICANT QUESTIONS ON THE VIABILITY OF A §1983 ACTION BROUGHT IN A WISCONSIN COURT.

In the decision below, the Wisconsin Supreme Court decided that whenever there is any state law remedy designed to redress the particular deprivation, including deprivations of life and liberty, then no constitutional violation can occur. The

impact of this decision is essentially to repeal 42 U.S.C. §1983 in Wisconsin. Under this reasoning, a citizen who is beaten to death by state officials has not suffered a constitutional deprivation if there exists a "wrongful death" action for the person's survivors. Indeed, the great bulk of law developed under §1983 over the last 100 years would be erased simply because some common law tort remedy may exist. The view taken by the Wisconsin court has the effect of trivializing the basic substantive rights guaranteed by the Constitution. It would sanction the denial of basic constitutional rights so long as the State paid some money damages after the fact.

Even if the above reasoning could somehow be justified, the relief offered by the State cannot be shown to be adequate to satisfy the requirements of due process.

State remedies can only be adequate when they prevent a <u>final</u> deprivation. In

Logan, supra, the state tort remedy could not prevent the loss of Mr. Logan's cause of action. At best, it could offer some compensatory damages, but could not make him fully "whole". In Parratt, supra, the state remedy could completely replace the lost hobby kit and thus avert a final deprivation. Therefore, it is not surprising that the Court in Logan found the deprivation of due process while in Parratt there was no such constitutional violation. In the present case, there is simply no legal procedure which can restore Heath Enright's life. Unlike few other deprivations, the loss of life is final and irreversible. The Wisconsin court reasons that because the State cannot fashion a remedy to restore the life of Heath Enright, and that the best the State can do is provide a wrongful death action, the arbitrary taking of Heath Enright's life is not a constitutional deprivation. This is il-

logical and is completely contrary to the teaching of Logan which says that when the State's post-deprivation remedy is inadequate, then due process has indeed been denied.

Finally, it should be noted that even if every argument respondents advance is justified to show the adequacy, on due process grounds, of the state tort remedy, it must be remembered that this remedy applies only to the parents of Heath Enright. Heath Enright's twin sister, Renee Enright, and his brother, Joseph Enright, Jr., have no remedy whatsoever if the §1983 action is dismissed. To allow the decision of the Wisconsin court to stand would be to say, in effect, that in a multi-plaintiff action brought under §1983, if one plaintiff has an adequate remedy at law to satisfy the Due Process Clause, then even a co-plaintiff who has no such remedy would be precluded from bringing an action. This, of course,

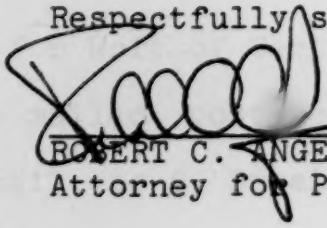
goes beyond the bounds of any logic. Each plaintiff's claim is a separate constitutional violation which cannot be satisfied simply by showing that another plaintiff has an adequate remedy in state law to satisfy due process.

CONCLUSION

For the foregoing reasons, the petitioners respectfully ask that this Court issue a Writ of Certiorari to the Supreme Court of the State of Wisconsin to review the constitutional errors claimed herein.

Dated at Milwaukee, Wisconsin, this 29th day of August, 1984.

Respectfully submitted,



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SUPREME COURT OF THE UNITED STATES

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DOROTHY ENRIGHT, et al.,

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v.

BOARD OF SCHOOL DIRECTORS OF
THE CITY OF MILWAUKEE, et al.,

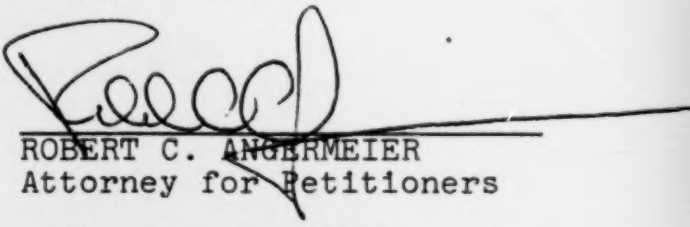
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 1984, three (3) copies of the Petition for Writ of Certiorari and Appendix were mailed, postage prepaid, via first class mail, to C. Donald Straub, attorney for the respondents, at his law offices located at 6620 West Capitol

Drive, Milwaukee, Wisconsin 53216. I further certify that all parties required to be served have been served.



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A P P E N D I X

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

DOROTHY ENRIGHT, as Special Administrator of the Estate of Heath Enright, HEATH ENRIGHT, RENEE ENRIGHT, JOSEPH ENRIGHT, and JOSEPH ENRIGHT, JR.,

Plaintiffs,

Case No. 536-191

-vs-

MEMORANDUM DECISION

BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE, DIANE CLARK, and THE WAUSAU INSURANCE COMPANIES,

Defendants.

This matter comes before the Court upon the defendants' motion to dismiss Count 2 of the Complaint which alleges a claim under 42 U.S.C. Section 1983. The basis of the motion is that the Third Amended Complaint fails to state a claim upon which relief can be granted.

This case arises out of a tragic incident occurring on September 14, 1979. Heath Enright at the time was six years of age and a student at Hampton Elementary

School in the City of Milwaukee. Heath Enright left the school approximately 12 p.m. and shortly after leaving the school grounds was confronted by Thomas White and strangled to death. This incident took place approximately one block from the school grounds.

The Complaint alleges that a citizen called the school in the forenoon and advised Diane Clark, who was the secretary in the principal's office, that a person later identified as Thomas White was acting in an unusual manner and generally appearing strange and suspicious. Diane Clark was asked to convey this message to the principal which she failed to do. The Complaint alleges that such failure constitutes negligence on the part of Diane Clark.

The plaintiff asserts that such negligence constitutes a violation of due process of law within the meaning of the Fourteenth Amendment and was done under

color of state law so that it was actionable under 42 U.S.C. Section 1983 which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

This Court concludes that the actions of Diane Clark do not constitute a violation of due process and further that the actions of Diane Clark were not done under color of state law.

The Seventh Circuit dealt with this problem in Bonner v. Coughlin, 545 F. 2nd, 565 (1976) and at Page 566 stated:

> "In Paul v. Davis, 424 U.S. 693, 699, 96 S. Ct. 1155, 1159, 47 L. Ed. 2nd 405, the Supreme Court refused to hold that the due process clause of the Fourteenth Amendment and Section 1983 'make actionable many wrongs inflicted by government

employees which had heretofore been thought to give rise only to state law tort claims.' Bonner does not contend that the guards deliberately took his trial transcript in violation of the due process clause. Rather he asserts that their negligence permitted some one else to take it. As Paul explains, the Fourteenth Amendment does not extend to such a claim. Speaking for five members of the Court, Justice Rehnquist pointed out:

'Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded. Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the 'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law. Griffin v. Breckenridge, 403 U.S. 88, 101-102, (91 S.Ct. 1790, 1797-98, 29 L. Ed. 2nd, 338, 347-48) (1971); a fortiori the procedural guarantees of the Due Process Clause cannot be the source of such law.' (424 U.S. at 700, 96 S.Ct. at 1160).

> Similarly here the plaintiff has pointed to no specific constitutional guarantee against the negligence of the two prison guards, even though they might be tort feasors under Illinois law. The dissenting Justices in Paul were of the view that 'intentional conduct' infringing a person's liberty or property interests without due process of law is within the reach of Section 1983 (424 U.S. at 720, 96 S.Ct. at 1170). They went no further, nor need we. If Section 1983 is to be extended to cover claims based on mere negligence, the Supreme Court should lead the way." (Emphasis added)

This Court is satisfied that the failure of an office secretary to pass on a telephone message to her superior is at best ordinary negligence and is not the basis of a 1983 action.

"Under color of law" has been defined as: "Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken under color of state law." United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031,

1943, 85 L.Ed. 1368 (1940); Williams v. United States, 341, S.C. 97, 71 S.Ct. 576, 95 L.Ed. 774 (1950).

This Court concludes that the alleged conduct of Diane Clark fails to fall within this definition and, therefore, on the second ground fails to come within the language of Section 1983. Defense counsel is directed to prepare an Order consistent with this decision.

Dated at Milwaukee, Wisconsin, this 22nd day of October, 1982.

BY THE COURT:

/s/ Laurence C. Gram, Jr. -
Br. #33

cc: Angermeier & Rogers
S. Donald Straub

No. 82-2158

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

DOROTHY ENRIGHT,
as Special Administrator of
the Estate of Heath Enright,
HEATH ENRIGHT, RENEE ENRIGHT,
JOSEPH ENRIGHT, and JOSEPH
ENRIGHT, JR.,

Plaintiffs-Appellants,

v.

BOARD OF SCHOOL DIRECTORS
OF THE CITY OF MILWAUKEE;
DIANE CLARK, and
WAUSAU INSURANCE COMPANIES,

Defendants-Respondents,

PEGGY KENNER, President;
DR. LEE F. McMURRIN, Superintendent,
and MR. JOHN J. PETERBURS,
Secretary Business Manager,

Defendants.

APPEAL from an order of the circuit court for Milwaukee county: LAURENCE C. GRAM, JR., Judge. Affirmed in part; reversed and cause remanded in part.

Before Wedemeyer, P.J., Decker and Moser, JJ.

DECKER, J. Joseph and Dorothy Enright and their children (Enrights) appeal from an order dismissing their complaint against the Board of School Directors of the City of Milwaukee (board), Diane Clark (Clark), and the Wausau Insurance Companies (Wausau). The complaint alleged a claim in negligence as well as a civil rights denial of due process claim under 42 USC § 1983 for the death of the Enrights' son, Heath. We disagree with the trial court's determination that public policy considerations here should be applied before trial to preclude the claim in negligence, and we reverse and remand with directions to the trial court to reinstate that claim. We agree, however, with the trial court that due process was not violated within the meaning of 42 USC § 1983 and affirm the dismissal of that count.

On September 14, 1979, Virginia Burkhardt, who lives across the street from the Hampton Elementary School, noticed a

man watching children play at recess. She phoned the principal's office and told Diane Clark, the secretary on duty, about the man. Clark said that she would inform the principal. Clark set the message aside and apparently forgot to tell the principal.

Heath Enright, a second-grader at the school, was strangled during the lunch hour by Thomas White, who apparently was the man observed seen lurking near the school. The Enrights brought a wrongful death action under state law and also claimed a civil rights violation under 42 USC § 1983. The trial court granted the defendants' motions to dismiss.

Regarding the common law negligence claim, the trial court considered whether to apply public policy considerations to liability in connection with the motion to dismiss or at the end of trial and decided to apply them at the earlier stage. We believe that the trial court should have adopted the preferred procedure of deference

to post trial application and accordingly we reverse on this issue.

Coffey v. City of Milwaukee, 74 Wis.2d 526, 541, 247 N.W.2d 132, 140 (1976), relied upon by the trial court, sets forth six reasons why recovery may be denied in a negligence claim on public policy grounds even where the chain of causation is direct and complete:

> (1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point. [Citations omitted.]

While it is true that the supreme court has decided on demurrer that public policy precludes liability, Morgan v. Pennsylvania General Insurance Co., 87

Wis.2d 723, 737-38, 275 N.W.2d 660, 667 (1979), nonetheless, Morgan concludes that it is generally better procedure to submit the negligence and cause-in-fact issues to the jury before addressing the public policy issue. Id. at 738, 275 N.W.2d at 667. This is especially true where the factual connections are particularly attenuated. Id.[1/] Such is the case here.

While it is alleged that Clark failed to notify the principal of the message received, the circumstances surrounding the alleged failure are by no means clear from the record before the trial court or this court. We are convinced that a full disclosure of the facts would facilitate the application of the six public policy considerations.

Because the public policy question is one of law, Morgan, supra at 737, 275 N.W.2d at 667, we need not accord deference to the trial court's determination of the question. Accordingly, we reverse and re-

mand on this issue.

The trial court also dismissed the Enrights' claim under 42 USC § 1983 on the grounds that "the actions of Diane Clark do not constitute a violation of due process and further that the actions of Diane Clark were not done under color of state law." The trial court founded its position upon Bonner v. Coughlin, 545 F.2d 565, 567 (7th Cir. 1976), cert. denied, 435 U.S. 932 (1978), where it was stated that "[i]f Section 1983 is to be extended to cover claims based on mere negligence, the Supreme Court should lead the way." We believe that, while the loss suffered by the Enrights was grievous and tragic, the existence of a state means of redress and the absence of a due process violation in the failure to act by Diane Clark eliminate a § 1983 claim.

The first inquiry in any § 1983 suit is whether the plaintiff has been deprived of a right secured by the Constitution and laws of the United States. Baker

v. McCollan, 443 U.S. 137, 140 (1979). As the Enrights point out in their brief, the due process clause of the fourteenth amendment delineates three specific guarantees: life, liberty and property. However, the fourteenth amendment protects one "only from deprivation by the 'State ... of life ... without due process of law.'" [Emphasis omitted.] Martinez v. California, 444 U.S. 277, 284, reh. denied, 445 U.S. 920 (1980). We believe that the rationale of the Martinez decision governs the case at bar and precludes a § 1983 action here.

In Martinez, the survivors of a murdered girl brought a § 1983 action against the state officials responsible for a parole-release decision which freed the man who, five months after his release, murdered the girl. Id. at 279-80. The Supreme Court stated that,

> [a]lthough the decision to release Thomas from prison was action by the State, the action of Thomas five months later cannot be fairly characterized

> as state action. Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to his victim or to have proximately caused her death, we hold that, taking these particular allegations as true, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment. [Citations omitted.] Id. at 284-85.

Here, while Clark's action could arguably be described as state action,[2/] the action of the murderer was not state action. As the Martinez Court pointed out, "[a]lthough a § 1983 claim has been described as 'a species of tort liability,' it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute." [Citation omitted.] Id. at 285.

A further independent ground exists for rejecting the § 1983 claim. The fourteenth amendment does not protect against all deprivations of life, liberty or property; it protects only against deprivations accomplished without due process of

law. Baker, supra at 145. Our inquiry must focus upon whether the Enrights have suffered a deprivation without due process of law. Therefore, we must determine whether this state's tort remedies provide a satisfactory means of redress. See Parratt v. Taylor, 451 U.S. 527, 537 (1981).

What redress or remedy the courts can provide to the parents of a murdered child for their loss can be but a paltry shadow of what was actually lost. Courts can neither restore the lost life nor order the clock to move back to a happier time. No one could challenge that the Enrights have suffered a grievous loss. Yet, the only remedy, poor as it may be, afforded under law is money damages. As such, the remedy afforded under state law is no more nor less adequate as recompense for loss than that afforded under § 1983. The Enrights have a common law negligence claim, a claim that we herein reinstate. Due process is therefore not denied them.

Parratt, supra, is further instructive in its approval of particular language from Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975), modified en banc, 545 F.2d 565 (1976).[3/] In Bonner, a prisoner alleged that prison officials made it possible by leaving the plaintiff's cell open, for others without authority to remove his trial transcript from his cell. The Parratt Court quoted Bonner for the following proposition:

> "It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against 'State' deprivations of property; in the latter situation, however, even though there is action 'under color of' state law sufficient to bring the amendment into play, the state action is not necessarily complete. For in a case such as this the law of Illinois provides, in substance, that the plaintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably

> conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment." [517 F.2d] at 1319. 451 U.S. at 542.

While we acknowledge that Justice Blackman's concurring opinion in Parratt, supra at 545-46, would not apply the opinion of the Court to deprivations of life or liberty, we note that the Court's opinion itself does not explicitly so narrow its application. We are persuaded by the logic set forth in the concluding paragraph of Parratt, supra at 544:

> Our decision today is fully consistent with our prior cases. To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of

> reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could challenge a constitutional violation under § 1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." Paul v. Davis, 424 U.S. 693, 701, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

By the Court.--Order affirmed in part, reversed and remanded in part.

Not recommended for publication in the official reports.

APPENDIX

1
We also note that the supreme court has stated that "[t]he cases in which a causally negligent tort-feasor has been relieved of liability are infrequent and present unusual and extreme considerations." Stewart v. Wulf, 85 Wis.2d 461, 479, 271 N.W.2d 79, 88 (1978).

2
Because of our disposition of this issue, we need not decide if Clark's failure to act was "under color of law" as required by 42 USC § 1983.

3
It is the modification upon which the trial court here founded its decision.

No. 82-2158

STATE OF WISCONSIN : IN SUPREME COURT

Dorothy Enright, as Special Administrator of the Estate of Heath Enright, Heath Enright, Renee Enright, Joseph Enright, and Joseph Enright, Jr.,

Plaintiffs-Appellants-Petitioners,

v.

Board of School Directors of the City of Milwaukee; Diane Clark, and Wausau Insurance Companies,

Defendants-Respondents,

Peggy Kenner, President; Dr. Lee F. McMurrin, Superintendent; and Mr. John J. Peterburs, Secretary Business Manager,

Defendants.

REVIEW of a decision of the Court of Appeals. Affirmed.

STEINMETZ, J. The issue in this case is whether negligence on the part of

an employee of the Board of School Directors of the City of Milwaukee gives rise to a 42 U.S.C. sec. 1983 action for the death of a child attending a Milwaukee public school. There are other issues related to the negligence issue and they will be discussed in the opinion.

This case involves a civil action which alleges common law negligence and deprivation of civil rights. In response to the third amended complaint, the defendants filed a motion to dismiss both the state negligence action and the federal civil rights action. The trial court, the Milwaukee county circuit court, Honorable Laurence C. Gram, Jr., issued an oral decision on August 30, 1982, dismissing the common law negligence action on public policy grounds. On October 22, 1982, the trial court issued a memorandum decision dismissing the federal civil rights claim. The plaintiffs appealed both decisions.

The court of appeals, in a pub-

lished decision, reinstated the common law negligence action, but upheld the dismissal of the civil rights action. Enright v. Milwaukee Sch. Directors Bd., 114 Wis. 2d 124, 338 N.W. 2d 114 (Ct. App. 1983). The defendants have not cross-petitioned for review of the re-instatement of the common law negligence action.

The facts describe a tragic death of a seven year old boy. Virginia Burgardt lives across the street from the Hampton Elementary School in the city of Milwaukee. On September 14, 1979, at approximately 10:00 a.m., she observed a white male in his early twenties, later identified as Thomas White, standing near the playground at the Hampton School watching children who were playing during recess. The white male continued to watch the children at recess and repeatedly looked around, apparently to determine if anyone was watching him.

At approximately 11:00 a.m. the same day, Cynthia Winquist was at the Hampton Elementary School "tot-lot" with her two year old son. She observed the adult white male watching the other children who were at recess on the playground at the time. Cynthia Winquist became suspicious of the man and later told the police that at the time the man was observing the children on the playground he appeared to be "snickering" to himself. After the children returned to the school, leaving Cynthia Winquist and her young child alone, she became increasingly concerned about her own safety as the yet unidentified white male began staring at her and continued to "snicker." Cynthia Winquist observed an electrical cord hanging out of the adult white male's trouser pocket. Upon seeing this she grabbed her child and left the tot-lot.

Virginia Burgardt observed the episode between Cynthia Winquist, her

child, and the unidentified adult white male. She then telephoned the principal's office at the Hampton Elementary School. The telephone was answered by the secretary on duty, Diane Clark. Virginia Burgardt advised the secretary of the man outside the school near the playground acting in a suspicious and unusual manner. Diane Clark told Virginia Burgardt that she would inform the principal, Mr. Dakich. Mrs. Burgardt returned to her front porch, watching the individual. The man stayed around the school area for a period of time.

Another neighbor, Nathlyn Voegtline, also observed the unidentified adult white male leaning on the playground fence gazing into the playground area at a time when there were no children on the playground. This was approximately 11:30 a.m. Both Mrs. Burgardt and Mrs. Voegtline commented to one another about the man's presence after Mrs. Burgardt had telephoned the

principal's office.

Diane Clark, the school secretary, acknowledged receiving the phone call from Mrs. Burgardt. She later told her supervisor that she had taken the message but "set it aside" and it "completely slipped her mind." Just after lunch, Diane Clark learned that a student had been killed or injured near the school. On receiving this information she tied the earlier phone call from the neighbor to the death or injury. It was at this time that she brought the phone call to the principal's attention.

On September 14, 1979, Heath Enright was a second grader at the Hampton Elementary School. He left the school at 12:00 p.m. that day to go home for lunch. At approximately 1:00, Robert Miller and his wife were driving west on Fairmont Avenue approximately one block from the Hampton Elementary School. They observed a young child lying on the grass between

the sidewalk and the curb. Mr. Miller went to assist and found the lifeless body of Heath Enright. Robert Miller confronted an adult white male standing nearby in connection with the discovery of Heath Enright's body. The adult white male, later identified as Thomas White, admitted to the Millers that he had strangled Heath Enright with a piece of wire and that he had taken the wire back to his home and returned to the scene. After the police arrived, White took police officers to the basement of his house and identified a black electrical wire on the floor as the one used to strangle Heath Enright.

At the time of Heath Enright's death, Captain Robert Proulx was the captain of the fourth district of the Milwaukee Police Department, the district in which the Hampton Elementary School is located. In the record there is an affidavit of Attorney Robert Angermeier, the plaintiffs' attorney, which sets forth

what Captain Proulx allegedly would have stated at trial. Captain Proulx allegedly would have testified that complaints regarding strangers on or near the school-grounds in his district are always received with high priority. Captain Proulx would have further testified that had the fourth district received the complaint regarding this suspicious person on or near the Hampton School grounds, officers would have responded and questioned the person in order to determine whether he had any legitimate business at or near the school. The officers normally would have checked at the school throughout the day in order to determine whether the suspicious person had returned to the area surrounding the school. Further, he would have testified that the responding officers would have had the option to arrest White for the violation of a city of Milwaukee loitering ordinance which specifically prohibits loitering near or on school grounds,

Ordinance 106-31(d) which forbids the following conduct:

"Loiterers in or about any school or public place at or near which children or students attend or normally congregate. As used in this subsection 'loiter' means to delay, to linger, or to idle in or about any said school or public place without a lawful purpose for being present."

Additionally, Captain Proulx would have testified that had circumstances warranted, the investigating officers would have been authorized to take White into custody for psychiatric evaluation. See sec. 51.15(1), Stats. 1/

1/ Sec. 51.15, Stats., provides:

"51.15 Emergency detention. (1) BASIS FOR DETENTION. (a) A law enforcement officer or other person authorized to take a child into custody under ch. 48 may take an individual into custody if the officer or person has cause to believe that such individual is mentally ill, drug dependent or developmentally disabled, and that the individual evidences:

"1. A substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm;

"2. A substantial probability of physical harm to other persons as manifested by evidence of recent homicidal or other violent behavior on his or her part, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as

Footnote 1 continued on App. 29.

Footnote 1 continued from App. 28.

evidenced by a recent overt act, attempt or threat to do serious physical harm on his or her part;

"3. A substantial probability of physical impairment or injury to himself or herself due to impaired judgment, as manifested by evidence of a recent act or omission. The probability of physical impairment or injury is not substantial under this subdivision if reasonable provision for the individual's protection is available in the community or, in the case of a minor, if the individual is appropriate for services or placement under s. 48.13(4) or (11);

"4. Behavior manifested by a recent act or omission that, due to mental illness or drug dependency, he or she is unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation or serious physical disease will imminently ensue unless the individual receives prompt and adequate treatment for this mental illness or drug dependency. No substantial probability of harm under this subdivision exists if reasonable provision for the individual's treatment and protection is available in the community, if the individual can receive protective placement under s. 55.06, or, in the case of a minor, if the individual is appropriate for services or placement under s. 48.13(4) or (11). The individual's status as a minor does not automatically establish a substantial probability of death, serious physical injury, serious physical debilitation or serious disease under this subdivision.

"(b) The officer's or person's belief shall be based on a specific recent overt act, attempt or threat to act or omission made by the individual and observed by or reliably reported to the officer or person."

Heath Enright was survived by his twin sister, Renee Enright, his brother, Joseph Enright, and his parents, Joseph Enright and Dorothy Enright. An action was commenced on behalf of the estate and the surviving family. Count I of the complaint alleges a wrongful death action under state law, sec. 895.04, Stats.[2/] Count II alleges a civil rights violation wherein Renee Enright, Joseph Enright, and Heath's parents allege that they were deprived of the love and companionship of their brother and child due to the unjustified and arbitrary conduct of a government agency.

The court of appeals concluded that because Wisconsin's tort remedy provided a "satisfactory means of redress,"

2/ Sec. 895.04(1), Stats., provides:

"895.04 Plaintiff in wrongful death action. (1) An action for wrongful death may be brought by the personal representative of the deceased person or by the person to whom the amount recovered belongs.

the Enrights did not suffer a deprivation without due process in connection with the death of Heath Enright. The court of appeals relied on Parratt v. Taylor, 451 U.S. 527 (1981), in rejecting the Enrights' sec. 1983 claim. The Parratt case dealt with procedural due process and not substantive due process; however, the majority did not make the distinction in its holding.

Plaintiffs rely on 42 U.S.C. sec. 1983 which provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

As we held in Terry v. Kolski, 78 Wis. 2d 475, 486, 254 N.W. 2d 704 (1977):

"We are satisfied that the provision of the federal law now appearing in the United States Code as 42 U.S.C. sec. 1983 is Revised Statute sec. 1979, affirmatively enacted by the codification of 1874. The statute now codified as

42 U.S.C. sec. 1983 indeed had its origin in the laws of the United States as a portion of the Civil Rights Act passed on April 9, 1866, as 14 Stats. 27."

Current consideration of sec. 1983 has its genesis in Monroe v. Pape, 365 U.S. 167 (1961). Monroe involved a search of a Chicago premises by Chicago police without a search warrant. The city of Chicago moved to dismiss the complaint on the ground that it was not liable under the Civil Rights Acts. That motion to dismiss was granted and the ruling was affirmed by the United States Supreme Court by the following language: "For we are of the opinion that Congress did not undertake to bring municipal corporations within the ambit of sec. 1979." Id. at 187. The opinion in Monroe was written by Justice William O. Douglas. There is dicta in Monroe which frequently has been considered by the courts of the United States and the issues created therein still are not totally resolved by the United States Supreme

Court. In some instances the final resolution of those issues has been avoided by that court. The first dicta of Monroe dealt with available state relief. The court stated: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Id. at 183.

In Monroe, the court affirmed its definition of "under color of law" that it had decided in United States v. Classic, 313 U.S. 299 (1941), Screws v. United States, 325 U.S. 91 (1945) and Williams v. United States, 341 U.S. 97 (1951). That definition "of under color" of state law was stated in Monroe as follows: "'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of

state law, is action "under color of" state law.'" 365 U.S. at 184. Those who reason that more than negligence is required for a sec. 1983 action look to this language for support of their position. The recitation of "misuse of power" is not consistent with merely a negligent act.

While referring to the Screws facts and the Monroe facts, the court in Monroe added the following dicta:

> "In the Screws case we dealt with a statute that imposed criminal penalties for acts 'wilfully' done. We construed that word in its setting to mean the doing of an act with 'a specific intent to deprive a person of a federal right.' 325 U.S., at 103. We do not think that gloss should be placed on sec. 1979 which we have here. The word 'wilfully' does not appear in sec. 1979. Moreover, sec. 1979 provides a civil remedy, while in the Screws case we dealt with a criminal law challenged on the ground of vagueness. Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Id. at 187.

Since that dicta, the court has several times considered the issue of whether negligent acts alone by govern-

mental agents are enough to allow a cause of action for deprivation of constitutional rights under sec. 1983. The final resolution of the negligence issue as a basis for sec. 1983 actions is for the United States Supreme Court since sec. 1983 is federal tort law and that court must determine whether intentional or unintentional conduct by governmental personnel is necessary for a violation of sec. 1983. Proper tort liability actions under sec. 1983 may be brought in Wisconsin state courts since the decision in Terry v. Kolski, 78 Wis. 2d at 496-97.

Monroe was decided in 1961 and its rule that governmental units were not liable in sec. 1983 actions lasted until 1978 when it was rejected in the case of Monell v. New York City Dept. of Social Services, 436 U.S. 658, 663 (1978), where the court held:

"[W]e indicated in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 279 (1977), last Term that the question presented here was open and would be decided 'another day.' That

other day has come and we now overrule Monroe v. Pape, supra, insofar as it holds that local governments are wholly immune from suit under sec. 1983."

The holding of Monell is at 690-91 where Monroe was selectively overruled but the language also was informative that negligence alone was not sufficient to hold governments liable under sec. 1983. It reads as follows:

"Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom sec. 1983 applies. Local governing bodies, therefore, can be sued directly under sec. 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the sec. 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other sec. 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels. As Mr. Justice Harlan, writing for the Court, said in Adickes v. S. H. Kress & Co., 398 U.S. 144, 167-168 (1970): 'Congress included customs and usages [in sec. 1983] because of the persistent and widespread discriminatory practices of state

officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.'

"On the other hand, the language of sec. 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor--or, in other words, a municipality cannot be held liable under sec. 1983 on a respondeat superior theory." (Emphasis added.)

The court concluded as follows:

"we conclude, therefore, that a local government may not be sued under sec. 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under sec. 1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court, see supra, at 660-662, and n. 2, we must reverse the judgment below. In so doing, we have no occasion to address, and do not address, what the full contours of municipal liability under sec. 1983 may be. We have attempted only to sketch so much of the sec. 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases, and we expressly leave further development of this action to another day." Id. at 694-95. (Emphasis added.)

The foregoing language of Monell

is not consistent with holding governmental corporations liable under sec. 1983 for negligent acts of employees.

Martinez v. California, 444 U.S. 277 (1980), involved a suit under sec. 1983 for the death of a 15 year old girl caused by a parolee. The court acknowledged the parole authorities were fully informed about the murderer's history of mental disorder and his previous commitment to a state mental hospital with a recommendation that he not be paroled, but nevertheless, he was paroled five years later. The parole authorities knew of his propensities and the likelihood that he would commit another violent crime. Five months after his release he tortured and killed the appellants' child. The court stated: "We assume, as the complaint alleges, that appellees knew, or should have known, that the release of Thomas created a clear and present danger that such an incident would occur. Their action is characterized

not only as negligent, but also as reckless, willful, wanton and malicious." Id. at 280. (Emphasis added.) Still, the court upheld a California statute giving immunity to parole officials and held:

"But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." Id. at 282.

The parole board had not even followed certain "requisite formalities" in its release of Thomas. In spite of this conduct of the parole board, alleged to have been not merely negligent but reckless, the court upheld the immunity statute as having "a rational relationship between the state's purposes and the statute." Id. at 282.

In Martinez the court stated: "Although a sec. 1983 claim has been described as 'a species of tort liability,'

Imbler v. Pachtman, 424 U.S. 409, 417, it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute." 444 U.S. at 285.

The court explained that the girl's death was too remote a consequence of the parold officers' action to hold them responsible under the federal civil rights law. In Martinez, a new aberrant ingredient of analyzing sec. 1983 actions appeared and that was one of remoteness of result from the state officers' actions which sounds like a public policy basis of decision as distinguished from the other issues of a sec. 1983 action. Significantly, the court cited Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928), a landmark case regarding tort law.

Parratt v. Taylor, 451 U.S. 527, involved an inmate at the Nebraska Penal and Correctional Complex who ordered by mail certain hobby materials valued at

$23.50. The hobby materials were lost and the inmate brought suit under 42 U.S.C. sec. 1983 to recover their value. The inmate claimed his property was negligently lost by prison officials in violation of his rights under the Fourteenth Amendment to the Constitution. More specifically, he claimed that he had been deprived of property without due process of law. The district court ruled that negligent actions by state officials can be a basis for an action under 42 U.S.C. sec. 1983. The Supreme Court stated:

> "While we have twice granted certiorari in cases to decide whether mere negligence will support a claim for relief under sec. 1983, see Procunier v. Navarette, 434 U.S. 555 (1978), and Baker v. McCollan, 443 U.S. 137 (1979), we have in each of those cases found it unnecessary to decide the issue. . . .
>
> "These two decisions, however, have not aided the various Courts of Appeals and District Courts in their struggle to determine the correct manner in which to analyze claims such as the present one which allege facts that are commonly thought to state a claim for a common-law tort normally dealt with by state courts, but instead are couched in terms of a constitutional deprivation and relief is sought under sec. 1983. The diversity in approaches is legion. See, e.g., Williams v. Kelley,

624 F. 2d 695 (CA5 1980); Beard v. Mitchell, 604 F. 2d 485 (CA7 1979); Fulton Market Cold Storage Co. v. Cullerton, 582 F. 2d 1071 (CA7 1978); O'Grady v. Montpelier, 573 F. 2d 747 (CA2 1978); Bonner v. Coughlin, 517 F. 2d 1311 (CA7 1975), modofied en banc, 545 F. 2d 565 (1976); Hampton v. Holmesburg Prison Officials, 546 F. 2d 1077 (CA3 1976); Jones v. Marshall, 528 F. 2d 132 (CA2 1975); Diamond v. Thompson, 523 F. 2d 1201 (CA5 1975); Kimbrough v. O'Neil, 523 F. 2d 1057 (CA7 1975); Carter v. Estelle, 519 F. 2d 1136 (CA5 1975); Pitts v. Griffin, 518 F. 2d 72 (CA8 1975); Russell v. Bodner, 489 F. 2d 280 (CA3 1973); Johnson v. Glick, 481 F. 2d 1028 (CA2 1973); McCray v. Maryland, 456 F. 2d 1 (CA4 1972); Carter v. Carlson, 144 U.S. App. D. C. 388, 447 F. 2d 358 (1971); Madison v. Manter, 441 F. 2d 537 (CA1 1971); Howard v. Swenson, 426 F. 2d 277 (CA8 1970); Whirl v. Kern, 407 F. 2d 781 (CA5 1968); and Striker v. Pancher, 317 F. 2d 780 (CA6 1963). We, therefore, once more put our shoulder to the wheel hoping to be of greater assistance to courts confronting such a fact situation than it appears we have been in the past.

"Nothing in the language of a sec. 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. In Baker v. McCollan, supra, we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under sec. 1983. We explained:

"'[T]he question whether an allegation of simple negligence is sufficient to state a cause of action under sec. 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a sec. 1983 action.' 443 U.S., at 139-40.

"Section 1983, unlike its criminal counterpart, 18 U.S.C. sec. 242, has never been found by this Court to contain a state-of-mind requirement. The

Court recognized as much in Monroe v. Pape, 365 U.S. 167 (1961), when we explained after extensively reviewing the legislative history of sec. 1983, that

"'[i]t is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies.' Id., at 180.

"In distinguishing the criminal counterpart which had earlier been at issue in Screws v. United States, 325 U.S. 91 (1945), the Monroe Court stated:

"'In the Screws case we dealt with a statute that imposed criminal penalties for acts "willfully" done. We construed that word in its setting to mean the doing of an act with "a specific intent to deprive a person of a federal right." 325 U.S., at 103. We do not think that gloss should be put on [sec. 1983] which we have here. The word "willfully" does not appear in [sec. 1983]. Moreover, [sec. 1983] provides a civil remedy, while in the Screws case we dealt with a criminal law challenged on the grounds of vagueness. [Section 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.' 365 U.S., at 187.

"Both Baker v. McCollan and Monroe v. Pape suggest that sec. 1983 affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any sec. 1983 action the initial inquiry must focus on whether the two essential elements to a sec. 1983 action are present: (1) whether the conduct complained of

was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." 451 U.S. at 532-33. (Emphasis added.)

Parratt dealt with the state negligently taking the inmate's property. The court went on to state:

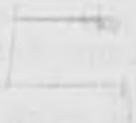
"Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation. Standing alone, however, these three elements do not establish a violation of the Fourteenth Amendment. Nothing in that Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations 'without due process of law.' Baker v. McCollan, 443 U.S., at 145. Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law. In particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process." Id. at 536-37. (Emphasis added.)

Then the court concluded:

"Application of the principles recited above to this case leads us to conclude the respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment. Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure." Id. at 543. (Emphasis added.)

The Parratt majority rejected the argument that the state did not adequately protect the inmate's interests because the procedural method of redress provides only for an action against the state as opposed to its individual employees. It contains no provisions for punitive damages, and there is no right to a trial by jury. Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under sec. 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. Parratt, 451 U.S. at 544. The remedies provided could have fully compensated the respondent for the property loss he had suffered, and the court held that they are sufficient to satisfy the requirements of due process.

To say the least, Parratt is confusing. The majority does state negligence may be enough for a sec. 1983 action and



yet it found the prison authorities, even though they violated prison rules regarding the prisoner's property, which seems to be negligence, had not violated due process since the state provided an alternative remedy which was sufficient to satisfy the due process requirements, even though that remedy would only repay the prisoner for the value of his hobby materials. Also, the state action of deprivation did not occur as a result of some established procedure.

The court went on to state that even though negligent action by the government qualifies as a 1983 action, the court will still look to whether a state remedy satisfies due process. The court stated:

"Our decision today is fully consistent with our prior cases. To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state

official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under sec. 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under sec. 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.' Paul v. Davis, 424 U.S. 693, 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society." Id. at 544.

The result of Parratt was to reverse the district court and dismiss the sec. 1983 action. The rationale of Parratt is confusing, which is obvious from a concurring opinion written by Justice Blackmun and joined by Justice White, a concurring opinion written by Justice Powell and a concurring opinion in part and dissenting in part written by Justice Marshall.

Justice Blackmun and Justice White limited the majority opinion to property values and rights only and said: "I do not read the Court's opinion as applicable to a case concerning deprivation of life or liberty." Id. at 545. The majority did

not apply a limit in its opinion to property value and rights only.

Justice Powell wrote: "Unlike the Court, I do not believe that such negligent acts by state officials constitute a deprivation of property within the meaning of the Fourteenth Amendment, regardless of whatever subsequent procedure a State may or may not provide. I therefore concur only in the result." Id. at 546. In his analysis Justice Powell wrote:

"First, the Court passes over a threshold question--whether a negligent act by a state official that results in loss of or damage to property constitutes a deprivation of property for due process purposes. . . .

"The central question in this case is whether unintentional but negligent acts by state officials, causing respondent's loss of property, are actionable under the Due Process Clause. In my view, this question requires the Court to determine whether intent is an essential element of a due process claim, just as we have done in cases applying the Equal Protection Clause and the Eighth Amendment's prohibition of 'cruel and unusual punishment.' The intent question cannot be given 'a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a sec. 1983 action,' Baker v. McCollan, 443 U.S. 137, 139-40 (1979). Rather, we must give close attention to the nature of the particular

constitutional violation asserted, in determining whether intent is a necessary element of such a violation.

". . . .

"A 'deprivation' connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss. The most reasonable interpretation of the Fourteenth Amendment would limit due process claims to such active deprivations. This is the view adopted by an overwhelming number of lower courts, which have rejected due process claims premised on negligent acts without inquiring into the existence or sufficiency of the subsequent procedures provided by the States. In addition, such a rule would avoid trivializing the right of action provided in sec. 1983. That provision was enacted to deter real abuses by state officials in the exercise of governmental powers. It would make no sense to open the federal courts to lawsuits where there has been no affirmative abuse of power, merely a negligent deed by one who happens to be acting under color of state law." Id. at 547-49. (Emphasis added.)

Justice Powell interpreted the majority's opinion as not concerned with whether negligent acts supply the right of action under sec. 1983 since in the majority's view such remedies as provided by the states for negligent acts would satisfy procedural due process and relegate cases of official negligence to non-federal forums. He would have adopted "the view

that negligent official acts do not provide any basis for inquiries by federal courts into the existence, or procedural adequacy, of applicable state tort remedies." Id. at 551-52. This is not the majority view.

Justice Marshall stated: "I join the opinion of the Court insofar as it holds that negligent conduct by persons acting under color of state law may be actionable under 42 U.S.C. sec. 1983." Id. at 554-55. He agreed further as follows: "I also agree with the majority that in cases involving claims of negligent deprivation of property without due process of law, the availability of an adequate postdeprivation cause of action for damages under state law may preclude a finding of a violation of the Fourteenth Amendment." Id. at 555.

Justice Marshall would have found there was not an adequate state law remedy available to the inmate in this case. He

would have required the state prison officials to inform the prisoner who claimed he was aggrieved by official action about remedies available under state law. Since they did not advise the prisoner accordingly, he would have affirmed the court of appeals. Id. at 556.

The concurring justices agreed with the result of Justice Rehnquist's majority opinion but were unable to persuade the majority that their beliefs as to the law should be stated in the reasoning of the court. Therefore, the holding of Parratt is not restricted to property right denials and negligent conduct by officials can serve as a basis for a sec. 1983 claim; however, if the local unit of government or state has provided a tort remedy as a means of redress for the deprivation of constitutional rights, that "satisfies the requirements of procedural due process." Also, the result of the action of governmental officials might not

be a deprivation caused by the official. Martinez, 444 U.S. at 285.

As the Wisconsin court of appeals stated in its decision in this case:

> "What redress or remedy the courts can provide to the parents of a murdered child for their loss can be but a paltry shadow of what was actually lost. Courts can neither restore the lost life nor order the clock to move back to a happier time. No one could challenge that the Enrights have suffered a grievous loss. Yet, the only remedy, poor as it may be, afforded under law is money damages. As such, the remedy afforded under state law is no more nor less adequate as recompense for loss than that afforded under sec. 1983. The Enrights have a common law negligence claim, a claim that we herein reinstate. Due process is therefore not denied them." 114 Wis. 2d at 129.

The common law negligence claim referred to by the court of appeals is not further identified but reference must have been to the statutory remedy of sec. 895.04, Stats., the wrongful death action.

If the United States Supreme Court truly had been interested in clarifying the law for other courts, it would have been more direct not to allow mere negligence as a ground for a sec. 1983 action.

Instead, in negligence pleadings for a sec. 1983 action, courts must now determine whether any governmental unit provides redress that satisfies the requirements of procedural due process. The court in Parratt did not distinguish between substantive due process and procedural due process injuries.

The plaintiffs argue that they should be able to bring a sec. 1983 action since the limit of damages under the Wisconsin remedy is restricted as follows:

(1) To a limit of $25,000 for loss of society and companionship under sec. 895.04(4), Stats.[3/]

3/ Sec. 895.04(4), Stats., provides:

"(4) Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed $25,000 for loss of society and companionship may be awarded to the spouse or unemancipated or dependent children, or parents of the deceased."

(2) A negligence action will not recognize the claims of the brothers and sisters for their loss of Heath.

(3) Due to the facts of the case, the parents' damages can be no greater than that provided for loss of society and companionship of Heath.

The United States Supreme Court ruled in Parratt that although the state remedies may not provide all the relief which may have been available if the party could have proceeded under sec. 1983, this does not mean that the state remedies are inadequate to satisfy the requirements of due process. Parratt, 415 U.S. at 544.

The plaintiffs argue that they are entitled to damages as a result of Heath's death for the deprivation of constitutional rights, since the parent-child relationship is protected by the constitution and its deprivation may be redressed under sec. 1983 and also the existence of a constitutionally protected associational interest

between siblings. We decline to decide those issues, since the dispositive issue of the due process claim is satisfied by the remedy available for redress in Wisconsin, and, therefore, a disposition of the other issues in this case is not necessary and only would be advisory.

By the Court--The decision of the court of appeals is affirmed.

Office of the Clerk

S U P R E M E C O U R T

STATE OF WISCONSIN

Madison, June 5, 1984

To

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The Court today announced an order in your case as follows:

DOROTHY ENRIGHT, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF HEATH ENRIGHT ET AL v. BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE ET AL, #82-2158.

The court having considered the Motion for Reconsideration filed herein by the Plaintiffs-Appellants-Petitioners and the response to the Motion,

IT IS ORDERED that the Motion for Reconsideration is denied with costs.

MARILYN L. GRAVES

Clerk of Supreme Court.